U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: March 21, 1991
CASE NO. 85-ERA-0022

IN THE MATTER OF

JAMES E. WELLS, JR.,
COMPLAINANT,

v.

KANSAS GAS & ELECTRIC CO.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

BACKGROUND

Respondent Kansas Gas & Electric Company (KG & E) was ordered to reinstate Complainant James E. Wells, Jr., by an order of the Secretary of June 14, 1984, in an earlier case brought by Complainant under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA or the Act), 42 U.S.C. § 5851 (1982). *See Wells v. Kansas Gas and Electric Co.*, Case No. 83-ERA-12, Sec. Decision, June 14, 1984, *aff'd, Kansas Gas & Electric v Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986). In this case, also brought under

the ERA, Complainant alleges that he again was discharged in retaliation for protected activities under the Act three months after he was reinstated in October 1984.

In Case No. 83-ERA-12, the Secretary found that KG & E discriminated against Complainant, when it discharged him for raising quality and safety questions about electric hardware and electrical installations at the Wolf Creek Nuclear Generating Station. The Secretary explicitly adopted the Administrative Law Judge's (ALJ) finding in that case that KG & E's reasons for discharging Complainant were pretextual. Sec. Decision, slip op. at 7. One of the grounds stated by KG & E for discharging Complainant on August 4, 1983, was KG & E's inability to verify an item of Complainant's educational background listed on a personal data history form. *Id.* at 5. Complainant claimed he had 20 hours credit in Electrical Systems from John C. Calhoun State Community College (Calhoun College). He did not actually attend Calhoun College but had been advised by Calhoun College that, if he were to attend, Calhoun College would give him 20 hours credit for courses taken during his military service. *Id.* at 5. An investigative firm, Equifax, was unable to verify Complainant's educational credits at Calhoun College. *Id.* Complainant told KG & E he would produce documentation of these credits, but was fired before he did so. *Id.* at 5-6. Complainant submitted the documentation to KG & E two weeks later, but KG & E refused to rehire him. *Id.* at 6. *See* ALJ's Recommended Decision in 83-ERA-12 at 17-18.

The Secretary ordered KG & E in 83-ERA-12 to reinstate Complainant "to his former or to a substantially equivalent quality assurance inspection position," to pay him back pay, and to expunge from his records all references to the discharge and refusal to rehire. Secretary's Decision at 11-12. KG & E appealed the Secretary's Decision to the United States Court of Appeals for the Tenth Circuit.[1] While the appeal was pending, KG & E reinstated Complainant in October 1984, but discharged him again in January 1985, as described below.

Complainant filed the instant complaint under the ERA on January 28, 1985, complaining that he was not reinstated to his original job, inspector of electrical systems, or to a substantially equivalent job. Complainant also complained that his discharge in 1985 following his reemployment was in retaliation for protected activities. He asserted that the grounds relied on for discharge by Respondent, that Complainant

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did not pass a psychological exam required of all employees, were pretextual. *See* Complaint of October 16, 1985.[2]

The ALJ in this case agreed with Complainant that the reason given by Respondent for discharging him was pretextual, and recommended that I order reinstatement of Complainant with back pay. Recommended Decision and order (R.D. and O.) at 14. Both parties filed briefs with the Secretary, and the record in this case has been carefully reviewed. For the reasons set forth below, I find that Respondent discriminated against Complainant when it discharged him in January 1985.

FACTS

Prior to the final inspection of the KG & E Wolf Creek Nuclear plant (referred to as the final walk-down), R.D. and O. at 3, and receipt of nuclear material (the time referred to as lock-down), Transcript of the Hearing (T.) at 589, all employees had to be cleared for unescorted access to the plant. T. 590. one part of that screening process involves a psychological examination of each employee.[3] T. 592. Walter Nelson, who was Manager of Administrative Services in the Nuclear Department of KG & E, T. 229, arranged for Complainant to be tested by a psychologist at the Wichita Clinic, T. 252, a facility KG & E had used for physical and psychological examinations for a number of years. T. 231. At Mr. Nelson's suggestion, Complainant was sent to the Wichita Clinic for psychological testing so that the process could be completed in one day. T. 251.

Dr. Charles S. Schalon, a clinical psychologist at the Wichita Clinic, T. 406, who had never done any testing for Respondent before, T. 235, 411-412, administered the Minnesota Multiphasic Personality Inventory (MMPI) to Complainant and interviewed him on October 30, 1984. T. 413-414. Until that date, Dr. Schalon was not aware of Complainant's first case or that Respondent had been ordered to reinstate him. T. 414. To Dr. Schalon, Complainant seemed surprised that Dr. Schalon did not know about Complainant's case against Respondent. *Id.* Dr. Schalon, however, did not ask Complainant any questions about his whistleblower case, T. 453, or why he had been fired. T. 455. Dr. Schalon expected that Complainant would be defensive because the case was pending and because Dr. Schalon was working for Respondent. T. 454. But Dr. Schalon did not know that Complainant had been fired for whistleblowing. T. 457. Although

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Dr. Schalon found that "of interest," *id.*, he did not think it was relevant to Complainant's defensiveness and hostility. T. 459.

Dr. Schalon decided that Complainant should take the test again because his answers were so defensive that it raised questions about the usefulness of the test. T. 415. Complainant took the test again on November 2, 1984, and was interviewed a second time by Dr. Schalon on November 6, 1984. T. 416. Based on these tests and interviews, Dr. Schalon stated at the hearing that he found Complainant hostile, defensive, abrasive and antagonistic. T. 417-18. He recommended to Respondent that Complainant be provisionally hired. T. 418, 420.[4] When Respondent told Dr. Schalon that hiring Complainant provisionally was not possible, Dr. Schalon said he needed background information on Complainant. T. 420. Respondent sent Dr. Schalon a copy of the same background report, Exhibit D-8, at issue in Case No. 83-ERA-12, Sec. Decision slip op. at 4, but Respondent did not tell Dr. Schalon about information Complainant had supplied which would have explained an apparent discrepancy in Complainant's educational record. T. 259. Respondent also sent Dr. Schalon a supplementary background report to update the information from the time the first report had been completed in 1983. Exhibit D-9. That supplementary report did not correct the discrepancy in the first report about Complainant's educational background.

Among other things in Complainant's background report, Dr. Schalon took note of the statement that Calhoun College had no record of Complainant's ever having attended there. T. 425. The update report, Exhibit D-9, repeated this information. Dr. Schalon noted this because Complainant's interview behavior raised questions about Complainant's veracity, and, taken together with the background information, suggested Complainant had been untruthful. *Id.* Dr. Schalon also characterized complainant, based on the Calhoun College discrepancy, as misleading and concealing relevant information. T. 431. Dr. Schalon testified that he assumed all the background information about Complainant was true, but that if it were not, that would affect his judgment of Complainant by indicating that Complainant had not been deceptive. T. 478. Dr. Schalon was not aware that the Calhoun College credits were an issue in Complainant's first case, or that the ALJ there found that, contrary to the statement in the background report, Complainant

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was entitled to the credits. *Id.* This would have been significant to Dr. Schalon because it would have indicated Complainant was not being deceptive. *Id.*

Dr. Schalon reported to Respondent on January 11, 1985, that he did not recommend Complainant for unescorted access. Exhibit C-9. Respondent states that it discharged Complainant for that reason alone. Respondent's Post Hearing Brief and Proposed Findings of Fact and Conclusions of Law, p. 44.

On his own initiative, T. 62, Complainant was examined on October 30, 1984, by Dr. Timothy S. Sippola, a clinical psychologist, T. 54, who administered the MMPI to Complainant and interviewed him. T. 84. Dr. Sippola reached conclusions significantly different from those of Dr. Schalon about Complainant's personality make up. Dr. Sippola stated that, based on his evaluation of Complainant, the denial of unescorted access was not warranted. Exhibit C-9.

DISCUSSION

The ALJ found that Respondent's reasons for placing complainant in the position chosen when he was reinstated, and for firing him, were pretextual. With respect to the firing of Complainant, the ALJ found that Respondent's contention that it relied solely on the advice of Dr. Schalon, an independent psychologist, was not "plausible. . . . " R.D. and O. at 10. The ALJ cited the following factors which led him to that conclusion: Respondent departed from its usual practice of giving MMPI tests at the plant when it sent Complainant to the Wichita Clinic to be tested; Complainant's test was supervised at the clinic by the psychologist; Complainant's appointment for the test was made by the manager of administrative services who "closely monitored the test results[,]" R.D. and O. at 11; an unsigned memorandum of October 30, 1984, over Dr. Schalon's name recommending against unescorted access showed a "rush to judgment[,]" *id.*; information concerning complaints and disciplinary action against Complainant were provided to Dr.

Schalon, and he relied on these together with the background report. *Id.* at 7. I find that these factors either are not supported by the record or are not reasonably inferred from evidence the record. However, for different reasons which are discussed below, I find that Respondent's reliance on the recommendation of Dr. Schalon as its basis for discharging Complainant was improper given Respondent's obligations under the decision in 83-ERA-12.

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1. *The Collusion Issue*

As part of his finding, which I do not adopt, that Respondent had a plan to discharge Complainant, the ALJ found that Respondent departed from its usual practices in setting up and conducting the psychological testing of Complainant. R.D. and O. at 11. But there is nothing in the record (and the ALJ gave no record reference) to support the conclusion that the tests were routinely administered at the plant personnel office rather than at the Wichita Clinic. Walt Nelson, Manager of Administrative services in Respondent's Nuclear Department, testified that Respondent frequently sent applicants to the Wichita Clinic or to another psychologist to be tested. There is also nothing in the record to suggest that Dr. Schalon, who administered the test to Complainant supervised Complainant's test more closely than other psychologists supervised the tests of other prospective employees of Respondent. *See* T. 413.

The only evidence on whether Respondent departed from its usual practice when it sent Complainant to the Wichita Clinic to be tested, rather than testing him in the plant personnel office, was the testimony of Tammy Sue Wiggins, a secretary in Respondent's personnel office, and that of Mr. Nelson. Ms. Wiggins worked for Respondent as a part time secretary for six months in 1983, and for 8 months from December 1983 to August 1984 as a permanent secretary. T. 264. In response to the question "Were you involved in any testing procedures?" Ms. Wiggins answered "Yes. I conducted all of the tests in the Personnel Department at the time." T. 265. Mr. Nelson, who had worked for Respondent for 24 years, testified that

> There are several ways of doing it [psychological screening). There is one for onsite that we use, we use Baker & Associates which is recommended to us by the NRC . . . . There is the Wichita Clinic . . . . There's two ways we do the Wichita Clinic one where we're doing a lot of people onsite, and time is not of the essence, we will have people give them the actual paper and pencil test and then the answer sheet is sent into the Wichita Clinic for grading . . . . The other way we do it . . . we send them either to the Wichita Clinic or to a subcontractor . . . on what we call a one-day evaluation.

T. 586-87. Given Mr. Nelson's long experience with Respondent and Ms. Wiggins' one year in the personnel office, the most

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reasonable interpretation of Ms. Wiggins testimony is that she performed all the tests of those that were done in the office during the year she worked there. Her testimony, therefore, would not be inconsistent with Mr. Nelson's that, when necessary, workers were sent to the Wichita clinic for testing. In any event, it is not reasonable to infer that Respondent and Dr. Schalon were in collusion to reach a predetermined result on Complainant's test because the test was performed at the Wichita Clinic. If anything, arranging for Complainant to be tested off site in Wichita tends to show that Respondent was not attempting to manipulate the results by having one of its office employees administer the test.[5] Similarly, I find nothing inappropriate in the fact that Dr. Schalon supervised the test of Complainant, and the ALJ did not explain why he found that improper. There was no suggestion, for example, that Dr. Schalon attempted to coach Complainant into giving damaging responses to test questions.

Both Dr. Schalon and Mr. Nelson denied that they discussed the evaluation of Complainant. The fact that Mr. Nelson set up the appointment for Complainant, therefore, has little significance. Dr. Schalon also denied that he prepared the unsigned October 30, 1984, memorandum recommending against unescorted access. If Dr. Schalon were making a "rush judgment," R.D. and O. at 11, he would not have told Complainant on the date he took the test that he needed to retake it because his answers showed defensiveness, and he would not have asked for background information after the second test and interview. Indeed, Dr. Schalon testified that when he recommended that Complainant be "provisionally hired" after the second test and interview, he did not mean Complainant had to be escorted, but only that he be made a probationary employee who is closely supervised. T. 476. Finally, there is nothing in the record to clarify further what "information" is referred to in Dr. Schalon's January 11, 1985, recommendation against unescorted access by the phrase "on basis of information on the above named individual between dates of October 30, 1984 and January 3, 1984 . . . " Dr. Schalon apparently was relying on the two tests and interviews and the background report, all of which occurred or were provided to him during that time period. There is nothing in the record to show that Dr. Schalon received a copy of the letter of reprimand of January 2, 1985. Exhibit D-11. If he had, it is reasonable to expect he would have referred to it in his testimony, since it tends to support his findings. Dr. Schalon testified that he

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was not given any information by anyone from Respondent about Complainant's relationships with his co-workers, T. 478, and he did not make any inquiries about that himself. T. 479.

Implicit in the ALJ's finding of pretext in the firing of Complainant for failing to obtain a positive recommendation from Dr. Schalon is the conclusion that Dr. Schalon was acting in bad faith and in collusion with Respondent. For example, the ALJ said

Respondent's position that it simply relied on professional advice "is not plausible, in view of the whole scenario case [sic]. There is a strong suspicion that there was more beneath the surface based on the close business relationships of the actors." R.D. and O. at 10. The "departures from practice" in giving the test to Complainant, discussed above, were viewed by the ALJ "as a method of assuring Wells [sic] inability to qualify for unescorted access," R.D. and O. at 11, implying collusion to reach a predetermined result. I cannot conclude on this record, however, that there was collusion between Respondent and Dr. Schalon, or that Dr. Schalon acted in bad faith. Dr. Schalon, a professional psychologist, would jeopardize his professional certifications and career by such actions. I find that the inferences drawn from the record by the ALJ, as discussed above, are not reasonable. Complainant has not shown by a preponderance of the evidence that Dr. Schalon acted in bad faith or that, for that reason, Respondent's grounds for discharging Complainant were pretextual.

2. *Validity of the Psychological Report.*

There is one aspect of Dr. Schalon's recommendation however which casts serious doubt on its validity, although it does not imply that Dr. Schalon was acting in bad faith. Respondent provided Dr. Schalon with the same inaccurate or unexplained background report which had been a crucial piece of evidence in the decision against Respondent in the first case, 83-ERA-12. See discussion above at 5-7. Dr. Schalon testified that he noted that personnel at Calhoun College were unable to locate any record of Complainant having attended there. Dr. Schalon took note of this because he had questions about Complainant's "veracity" and this piece of information suggested Complainant provided untruthful information. T. 425. Later, Dr. Schalon testified that the Calhoun College information showed Complainant was misleading and concealing relevant information. T. 431.

On cross examination, Dr. Schalon said he had assumed the background report was accurate. If it were not, he conceded that would affect his judgment. T. 477-478. He did not know that the Calhoun College information was an issue in the first case. Nor

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did he know that the ALJ there had held that Complainant was entitled to college credit and that Equifax, which conducted the background investigation, would have found this out if it had responded to an inquiry by Calhoun College asking whether the credits in question were acquired at its junior or technical college. *Id.*; ALJ Recommended Decision and order in Case No. 83-ERA-12, slip op. at 17. Dr. Schalon said this would have made a difference in his evaluation because it would have indicated that Complainant was not being deceptive. *Id.* When asked whether that would have been of some significance to him, Dr. Schalon answered "[i]t would have been, indeed." T. 478.

Dr. Schalon also had not been briefed on, or given a copy of, the decision in the first case. The circumstances of Complainant's employment with Respondent at the time Dr.

Schalon interviewed him thus played little, if any, role in his evaluation of Complainant, when it may have explained some of the defensiveness Dr. Schalon perceived. *See Hoska v. United States Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982) (the circumstances of a subject of a psychiatric evaluation for security clearance cast doubt on the conclusion that the person had an "obsessive-compulsive neurosis" and explained why he appeared "tense and guarded.") 677 F.2d at 142.

Respondent made no effort to insure that the inaccurate information about Complainant's educational background was corrected when the Equifax report was provided to Dr. Schalon. Mr. Nelson himself called Dr. Schalon to arrange for Complainant to be tested and interviewed at the Wichita Clinic in October 1984. T. 234. Mr. Nelson also spoke to Dr. Schalon, after Complainant had taken the psychological test the first time, about Complainant's refusal to sign a release to obtain background information, T. 236, and again when Dr. Schalon told Mr. Nelson that Complainant could be "provisionally" accepted. T. 237. Dr. Schalon asked for a background report on Complainant when Mr. Nelson told him that "provisional" acceptance was not permitted by KG & E. *Id.* Mr. Nelson asked Dr. Schalon to put his request for the background report in writing, which he did. T. 238. Although Mr. Nelson knew that the background report was one of the reasons KG & E fired Complainant the first time in 1983, and he had read the Secretary's decision in the first case, Mr. Nelson testified that he did not know there was inaccurate information in the background report, T. 256, and he made no effort to assure that the information in the report was accurate; he "didn't even think about it. . . ." *Id.*

Mark Vining, in-house counsel for KG & E, who was counsel of

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record in the first case, was the person who sent Dr. Schalon a copy of the original Equifax report of August 23, 1983, and the updated report received in late December 1984 or early January 1985. T. 259-260. Mr. Vining was fully aware of the discrepancy in the first Equifax report, but he did not inform Dr. Schalon about it. T. 262-263.

Respondent thus provided the same inaccurate information to Dr. Schalon which the Secretary had found was proof of discrimination in the first case, and did so willfully, that is, Respondent "either knew or showed reckless disregard for the matter of whether its conduct was prohibited," *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), by the Secretary's order in Case No. 83-ERA-12. As discussed above, this inaccurate information was critical in Dr. Schalon's rejection of Complainant for unescorted access. Respondent should not benefit in its defense from its knowing submission of the inaccurate information. *United States for Use and Benefit of Bernard Lumber Co., Inc. v. Lanier-Gervais Corp.*, 896 F.2d 162, 168 (5th Cir. 1990).

For these reasons, I find that Respondent's psychological evaluation of Complainant was not valid in the context of Respondent's obligation under the Secretary's order in

Case No. 83-ERA-12 to reinstate Complainant and expunge his records. Respondent had the right to require Complainant to submit to any personnel procedures required of other similarly situated employees. But it also had an obligation, under the decision in 83-ERA-12, to "take affirmative action to abate the violation" of the ERA found there and not to permit the same error which led to the first violation of the ERA to infect those procedures. 42 U.S.C. § 5851(b)(2)(B). *Cf. Kerr v. National Endowment for the Arts*, 726 F.2d 730, 732-733 (Fed. Cir. 1984) (agency has authority to enforce terms of its prior orders); *Daniel Construction Co. v. Local 257*, 856 F.2d at 1182 (enforcing arbitrator's back pay award to nuclear power plant employees fired for failing psychological test found invalid by arbitrator). Respondent therefore violated the ERA when it failed to comply with the Secretary's order in 83-ERA-12.

Complainant therefore is entitled to back pay with interest from the date he was discharged in January 1985 to the date he is reinstated under this order. Interim earnings and amounts Complainant could have earned with due diligence should be deducted from back pay due. Interest should be paid at the rate provided for in 26 U.S.C. § 6621 (1988)[6] .

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I cannot accept, however, Complainant's assertion that the recommendation of a psychologist he chose privately, Dr. Sippola, is sufficient to grant Complainant unescorted access. Under the ANSI standard and NRC Regulatory Guide, an NRC licensee such as Respondent is responsible for establishing and maintaining a psychological assessment program including tests and clinical interviews by a licensed psychologist or psychiatrist. Exhibit D-3 at 15; Exhibit D-4, para. 4.3(2) at 6. There is nothing in the ANSI standard or NRC regulatory guide which would require Respondent to accept the findings of a psychologist privately employed by an employee or applicant for employment.[7]

I will order Respondent to reinstate Complainant, subject to the same conditions as any other new employee. If appropriate for the position and conditions at the plant, Respondent may require Complainant to undergo psychological testing in accordance with the commitments in its NRC license. It is incumbent upon Respondent to provide to the psychologist conducting the tests complete, accurate information about Complainant's background, experience and education.

3. *The 1984 Reinstatement*.

Complainant also challenges the action of Respondent in reinstating him in 1984 to a position which he claims was not equivalent to the position he held in 1983. Complainant was a Quality Assurance inspector of electrical systems when he was fired in August 1983. In Case No. 83-ERA-12, the Secretary ordered that Complainant be reinstated "to his former or to a substantially equivalent quality assurance inspection position." Slip op. at 11. When Complainant was reinstated in October 1984, he was assigned to work as a

Quality Control receiving inspector in the warehouse. T. 544. Complainant does not contend that there was any difference in pay between the jobs. T. 187.

Complainant was reinstated by Respondent on October 15, 1984. The complaint in this case was filed on January 28, 1985. The claim that Respondent violated the Act when it reinstated Complainant to a position different from the one he held in 1983 appears to be barred by the statute of limitations. 42 U.S.C. § 5851(b)(1); *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988). In any event, I find that the Quality Control receiving inspector position was substantially equivalent to his earlier electrical inspector position. It had the same rate of pay, and equal or greater responsibility (T. 545-547; T. 528). There is nothing in the record to indicate that the positions were any

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different in promotion potential or job security.

ORDER

Accordingly, pursuant to 41 U.S.C. § 5851 (b) (2) (B) it is ORDERED that:

1. Respondent shall take affirmative action to abate the violation including: expunging from Respondent's records incorrect, incomplete or inaccurate information about Complainant as found herein and in the Secretary's decision in Case No. 83-ERA-12; and assuring that any background, experience or education information Respondent provides to the testing psychologist is complete and accurate.
2. Respondent shall reinstate Complainant to the same position or one substantially equivalent to the one he held when he was discharged in January 1985.
3. Respondent shall pay Complainant back pay, with interest, from the date of discharge to the date of reinstatement, less interim earnings.
4. Respondent shall pay Complainant's reasonable attorney's fees and costs.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Respondent also appealed a district court order entered in an action brought by Complainant to enforce the Secretary's remedial order in 83-ERA-12. *See* 42 U.S.C. §

5851(e). The two appeals were consolidated. *KG & E v. Brock*, 780 F.2d at 1507 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986).

[2] I would note that in neither the formal complaint of October 16, 1985 filed with the ALJ nor the initial complaint filed with the Wage-Hour Administrator did Complainant complain about the formal reprimand he was given a few days before being fired in January 1985. Complainant was reprimanded for on-the- job misconduct. Respondent apparently does not rely on that document or the events giving rise to it as additional alternative grounds for discharge. Accordingly, I do not view that incident as an issue in this case.

[3] KG & E represented at the hearing that this requirement was imposed by the Nuclear Regulatory Commission (NRC) as a condition of the plant's license. T. 598-603. The draft Regulatory Guide and Value Impact Statement (Defendant's Exhibit 3) which contains specific provisions on Psychological Assessment, has never been published by the NRC as a final rule and was used by KG & E only as a guide. T. 596. KG & E was committed by its license (which is not in the record) to comply with the American National Standard Industrial Security for Nuclear Power Plants (Exhibit D-4) (ANSI) which provides for, among other things, psychological assessments of employees. *Cf.* discussion in *Daniel Construction Co. v. Local 257, IBEW*, 856 F.2d 1174, 1176-77 (8th Cir. 1988).

[4] KG & E rejected Dr. Schalon's recommendation before he had an opportunity to explain that by "provisional hiring," he meant that Complainant should be closely supervised, not that he had to have an escort. T. 476.

[5] The ALJ concluded that Respondent "contrived" the discharge of Complainant based in part on Respondent's past altering of test scores "for affirmative action or other reasons," its manipulating records, and its "manag[ing] the evidence given in the original trial of this case." R.D. and O. at 12. Mr. Nelson explained that, with respect to another test -- for selection of reactor operator trainees -- where choice of a cutoff score is somewhat arbitrary, he had increased the scores of minorities and women by half a point for affirmative action purposes. T. 240-242. There is no evidence indicating that scores on psychological exams ever were altered, or that scores on any other examinations ever were altered for "other reasons." It is not clear what the ALJ meant by "manipulating records" and "managing the evidence." *See* ALJ's discussion implicating collusion between Respondent and Dr. Schalon. R.D. and O. at 12-13.

[6] Department of Labor regulations implementing section 3 of the Debt Collection Act of 1982, 31 U.S.C. § 3711(f) (1982), set forth the rate of interest chargeable on debts owed to the Department. Under 29 C.F.R. § 20.58(a) (1988), "[t]he rate of interest prescribed in section 6621 of the Internal Revenue Code shall be sought for backwages recovered in litigation by the Department." While this regulation, by its terms, is not controlling on the question of appropriate prejudgment interest in this case, adopting an approach consistent with the regulation is reasonable. Additional support for this method derives from analogous employment discrimination cases. *See New Horizons for the Retarded, Inc., et*

al., 283 NLRB No. 181, 125 LRRM 1177 (May 28, 1987); *EEOC v. FLC & Bros. Rebel, Inc.*, 663 F. Supp. 864, 869 (W.D. Va. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988). *See also Clinchfield Coal v. Federal Mine Safety & H. Com'n*, 895 F.2d 773, 780 (D.C. Cir. 1990) (approving IRS rate in assessing interest on compensation awards).

[7] The then Chairman of the Nuclear Regulatory Commission and a member of the NRC each wrote letters to the Secretary concerning this case, and as required by the Administrative Procedure Act (APA), 5 U.S.C. § 557(d)(1) (1982), these communications were placed "on the public record" and copies were provided to the parties. This decision is based exclusively on the record submitted by the ALJ with his R.D. and O. and the briefs of the parties to the Secretary. 29 C.F.R. § 24.6 (1989); 5 U.S.C. § 556(e).